SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 894

ALLEN ROTH,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Citation To Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	4
Statement Of The Case	4
A. Nature of the Charges	4
B. The prosecution's effort to establish that the defendant and O'Connor were the same person	5
The First Walk Through The Courtroom	7
The Photographic Identification	8
The Second Walk Through The Courtroom	9
The Attempted Voice Identification	10
C. The Government's other proof, thought by the Court of Appeals to have rendered the conceded *Wade* violation harmless	12
The answering service representative	13
The mail seized from the defendant	13
Persons to whom the defendant sold merchandise	14
Reasons For Granting The Writ	14
I. Application of the exclusionary rules in identification cases should not be made to hinge upon whether the witness makes a positive identification or simply testifies that the defendant "looks like" the perpetrator	17
II. Where an identification procedure has occurred which is subject to the criteria enunciated in *United States* v. *Wade*, 388 U.S. 218, and *Simmons* v. *United States*, 390 U.S. 377, it is incumbent upon the prosecution to advise the defense in order to give the defense an opportunity to demand an exclusionary hearing, before the identification is revealed to the jury, and in	

PAGE

order to safeguard against the unwitting revelation of prior identifications to the jury. This is particularly so where the procedures were conducted after the trial had commenced 18

III. Since defense counsel was readily available in an adjoining room and the case was in the midst of trial, it was a violation of Fifth Amendment due process and the Sixth Amendment right to counsel when the prosecutor failed to invite defense counsel to witness the photographic identification 19

IV. The combined circumstances of the various identification procedures clearly raise a reasonable doubt as to whether they deprived the defendant of a fair trial 22

CONCLUSION 23

APPENDICES:

A. Opinion of Court of Appeals A-1
B. Judgment and Commitment of the United States District Court A-10
C. Judgment of Affirmance of United States Court of Appeals A-12
D. Order on Petition for Rehearing A-15
E. Order on Petition for Rehearing, *En Banc* A-16

TABLE OF AUTHORITIES

Cases:

Chapman v. California, 386 U.S. 18 (1967) 22
Simmons v. United States, 390 U.S. 377 (1968) .. 3, 18, 19, 21
United States v. Wade, 388 U.S. 218 (1967) ..3, 10, 16, 17, 18, 20, 21, 22
United States v. Zeiler, 427 F.2d 1305 (1970) 20, 22

Constitutional Provisions:

Fifth Amendment 4, 19, 21
Sixth Amendment 4, 19, 21

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Petitioner, ALLAN ROTH, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on July 31, 1970 (Appendix C hereto, *infra*, p. A-12).

Citations To Opinions Below

The yet unreported opinion of the Court of Appeals, affirming the judgment of conviction herein, is printed in Appendix A hereto, *infra*, pp. A-1-9.

Jurisdiction

The judgment of the Court of Appeals was entered on July 31, 1970 (Appendix C hereto, *infra*, p. A-12).

On September 15, 1970, a Petition for Rehearing was denied by the Court of Appeals (Appendix D hereto, *infra*, p. A-14), and on September 24, 1970, an alternative Petition for Rehearing *En Banc* was denied (Appendix E hereto,

infra, p. A-16). Pursuant to and subject to the provisions of Rule 41 of the Federal Rules of Appellate Procedure, the Court of Appeals ordered a stay of its mandate for the permitted period of thirty (30) days from the date of the en banc denial, and continued the petitioner on bail for the duration of that stay (Appendix D hereto, *infra*, pp. A-14-15).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

The petitioner was charged with assuming a fictitious identity for the purpose of making fraudulent representations by mail. At trial, the Government produced only one witness who had ever met the person who had used the allegedly fictitious identity. The meeting had taken place three years before trial for a period of five minutes at a place which the witness could not recall. The witness, admittedly, had no reason for taking particular note of the person he met. He did not again advert to the meeting until he was discovered and privately questioned by the prosecutor *after* trial had commenced. His trial testimony was that the defendant "looked like" the person he had briefly met three years before.

During cross-examination, the defense and the jury learned that, unbeknownst to the defense, the witness had been made to engage in three secret identification procedures during the course of the trial. The first was unsuccessful and consisted of a walk through the Courtroom two days before his testimony. On that same day he was made to view a display of photographs from which he selected the defendant's picture. He could not recall, and the prosecutor did not reveal, which of the two procedures occurred first.

On the day of his testimony he was again asked to walk through the Courtroom and he selected the defendant from the four persons who were present.

The Court of Appeals held that the second walk through the Courtroom violated this Court's holding in *United States* v. *Wade*, 388 U.S. 218 (1967), but that a reversal was not required since: 1) the witness did not make a positive identification, and 2) within the context of the Government's proof, the impermissible procedures did not "infect the trial." The Court further held that the photographic identification, in the absence of counsel, was not constitutionally proscribed. The questions thus presented are:

1. Where the only eyewitness testifies that the defendant "looks like" the culprit, do the exclusionary rules enunciated in *United States* v. *Wade*, 388 U.S. 218 (1967) and *Simmons* v. *United States*, 390 U.S. 377 (1968) apply to the same extent as if the witness had made a "positive" identification?

2. Where the prosecution causes an eyewitness to engage in three secret identification procedures while trial is in progress, is it incumbent upon the prosecutor to so advise the defense before the witness is called upon to make an in-court identification before the jury? Where the prosecutor fails to so inform the defense is the defendant's right to a fair trial prejudiced by: (a) his consequent lack of opportunity to demand an exclusionary hearing, and (b) the consequent and unwitting revelation to the jury, during cross-examination, of the fact of the prior undisclosed identifications?

3. Since the trial had already begun, and defense counsel was readily available, was the defendant deprived of his

Sixth Amendment right to counsel and his Fifth Amendment right to due process of law when the only prosecution eyewitness was made to engage in a photographic identification in a room adjoining the Courtroom but in the absence of defense counsel?

4. Did the Court of Appeals err in its conclusion that the concededly unconstitutional walk through the Courtroom did not "infect the trial"?

Constitutional Provisions Involved

This case involves the due process clause of the Fifth Amendment and the right to counsel granted by the Sixth Amendment to the Constitution of the United States.

Statement Of The Case

A. Nature of the Charges

This is a criminal case in which the defendant, alone, was charged in an Indictment with using the mails as part of a scheme to defraud a number of manufacturers and suppliers in violation of 18 U.S.C. §§ 2, 1341 and 1342 (A. 2-3*).

The essence of the alleged scheme was that the defendant:

1. Employed the name "Murray Corporation" claiming it to be a division of Murray Corporation of America—a substantial highly rated corporation with offices in New York City;

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* References to the opinion of the Court of Appeals, as reproduced in Appendix A of this brief, are preceded by an "A". References to the stenographic transcript of the trial minutes, which are on file with the Clerk of the Court of Appeals, are preceded by a "T". References to the other court records, which are on file with the Clerk of the Court of Appeals, are preceded by an "R".

2. Utilized a telephone-mail service in New York City for the purpose of receiving responsive communications from manufacturers who were to be defrauded;

3. Assumed the fictitious name "P. K. O'Connor" and purported to be the executive vice-president of the Murray Corporation;

4. Under the O'Connor identity, the defendant allegedly induced various manufacturers to send him their catalogs and/or merchandise (A. 2-3).

Although much of the evidence at trial concerned the defendant's complete or partial failure to pay for merchandise received, the actual charge was that, as part of his fraudulent scheme, the defendant had induced fifteen manufacturers to send him descriptive brochures. These fifteen receipts of mail addressed to O'Connor as a representative of the lesser Murray Corporation, constituted the fifteen counts of the Indictment (R. 3-7). At the time of his arrest by postal inspectors, the fifteen pieces of mail were found in the trunk of the defendant's car (A. 3).

The defense contended that P. K. O'Connor actually existed and was loosely associated with the defendant in the operation of the lesser Murray Corporation. It was conceded that their organization was not in any way connected with the Murray Corporation of America. If O'Connor had made misrepresentations in order to capitalize upon the credit standing of the larger corporation, then he did so without the knowledge of the defendant. O'Connor had since absconded and could not be produced by the defense at trial.

The Government contended that O'Connor did not exist, but was merely a fictitious name adopted by the defendant. Prior to and during the activities complained of, the lesser

Murray Corporation had registered with the Post Office Department (since it utilized a mail service); *both the defendant, in his own name, and O'Connor were listed as principals.*

B. The prosecution's effort to establish that the defendant and O'Connor were the same person.

With the identity problem to overcome, the prosecution called as a witness Donald Levine, an employee of one of the companies with which the lesser Murray Corporation had dealings. Levine testified that in or before January, 1966, he met with a person who purported to be O'Connor, "In an office in the 40's in New York City, but I don't recall the address or the exact location." No one else was present at the meeting (T. 840).

The brief direct examination of the witness proceeded as follows:

> "Q. I want you to look around the courtroom carefully and tell us whether you see anyone who looks like Mr. O'Connor. A. This gentleman over there.
>
> Mr. Doyle: Your Honor, may the record reflect the witness had indicated the Defendant Allen Roth.
>
> Q. I want you to state, sir, to the best of your recollection, what Mr. O'Connor said to you and what you said to O'Connor. A. Well, I wanted to find out for what reason the merchandise was ordered that he ordered from our company, and this was a result of a message that was given me from Mr. Lane of our company, and I was told that the merchandise was going to be used for premium incentive gifts."
>
> Q. And did you say anything to Mr. O'Connor about this? A. No, I didn't. It was a brief conversa-

tion, that much I remember. I don't remember too much more about it.

Q. Did he tell you anything that you can remember? A. No, except that this would be a premium type of operation of some sort.

Q. Now, can you explain what premium means, sir, in the business? A. Well, the way I understand premiums, it is a gift to a salesman or a gift to some employee as an incentive for work rendered.

Q. Now, is that the full extent of the conversation to the best of your recollection? A. It is.

Q. And approximately how long did the conversation last. A. Very briefly. Very briefly. *I would say I was in and out of the office in five minutes.*"

[End of Direct Examination] (T840-841).

The First Walk Through The Courtroom

On cross-examination the clearly unexpected* fact of a prior identification procedure suddenly came forth from the witness when defense counsel asked him about a prior conversation he had had with the prosecutor:

> "He [the prosecutor] asked me to walk through the courtroom, take a look at anybody in the courtroom and everybody in the courtroom to see whether I saw anybody that I thought might be Mr. O'Connor." (T. 848).

With this information now before the jury, the defense could not drop the issue. The day of the witness' testimony was a Friday. As the facts unfolded, it appears that on the prior Wednesday, at approximately 2:20 P.M., the prosecutor

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* In its opinion, the Court of Appeals did not discuss the problem presented by the trap which had been set by the prosecution in not advising the defense that secret attempts had been made at identification.

requested that the witness go into the courtroom and look for someone he thought "might be Mr. O'Connor." (T. 849). The prosecutor and the witness entered the courtroom together and then the prosecutor began moving around the room (T. 877-879). There were eight to twelve persons in the courtroom at the time, and, as the witness entered, the jury also entered (T. 849, 851). As to this phase of the identification procedure the witness testified:

> "I could not find him at that time. In other words, I could not find anybody in the room at that particular time that I could identify." (T. 851)*

The Photographic Identification

However, on that same Wednesday, the witness was shown a group of photographs by the prosecutor. "He gave me a group of pictures and asked me if I could recognize any of them as being the man who I refer to here as Mr. O'Connor." (T. 856). Although only two days had elapsed since these events, the witness could not remember which of these was done first, the walk through the courtroom or the showing of the pictures (T. 873). Thus, it could not be ascertained whether the photographic identification was the result of his realization that he had just seen one of the depicted persons in the courtroom.**

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* The Court of Appeals chose to interpret Levine's testimony as meaning that the defendant was not in the Courtroom at the time (A. 5). That conclusion flys in the face of logic. If the defendant were not there, why would the prosecutor have conducted the procedure? Where else would the defendant be as the jury was filing into the Courtroom? The more likely explanation is that Levine could not identify the defendant.

** Having unrealistically concluded that the defendant was not present during the walk through the Courtroom, the Court of Appeals avoided the necessity of answering this argument. By thus clearing the photographic identification of taint, it was then able to utilize the accurate photographic identification for the purpose of rendering the second walk through (*infra*) harmless (A. 8).

He further testified that:

> "I had no conversation with Mr. Doyle as I looked through the pictures. I looked through the pictures and I selected two that I thought looked like Mr. O'Connor. * * * I discarded the other pictures without any conversation with Mr. Doyle or Mr. Carroll, I believe it is. (T. 865).
>
> * * *
>
> "These two. These two as resembling in my mind the man that I had met with briefly who told me he was Mr. P. K. O'Connor. Now of the two, Mr. Doyle asked me do either of the two look more like him or does one of the two look more like this man than the other, and I took this picture (T. 872).

Prior to being shown the pictures, the witness was *not* asked to describe what O'Connor looked like (T. 858). He "was asked to identify any picture that I thought might be the man that I met briefly in 1966." (T. 858).

Continuing on cross-examination, the witness could say only that the defendant "resembled" O'Connor, but "would not swear [to it] as a positive identification", and could give no characteristics upon which his identification was based (T. 862), nor could he give any description of the place in which they met, other than to say that it was "a room". (T. 882).

The Second Walk Through The Courtroom

Upon redirect examination, the witness revealed that a second attempt at identification was performed in the courtroom on the very day that he was testifying in Court, at about 12:30 P.M. At the time, there were four persons in the room, one of them being the defendant (and, pre-

sumably, his eight-five year old attorney—although the record does not reveal who the other three were). The witness told the prosecutor that the defendant "looked like the Mr. O'Connor I had met with." (T. 891-892). This second identification process was likewise at the request of the prosecutor (T. 894).*

The Attempted Voice Identification

After eliciting the above testimony, the prosecutor applied to the Court for a direction that the defendant speak certain words in the presence of the jury so that the witness would have an opportunity to make a voice identification. Over objection, the Court granted the application, explaining to the jury what was going to be done:

> "Now, in this case Mr. Levine has testified that he spoke briefly with the defendant, whom he then identified and who identified himself as Mr. O'Connor. And, of course, *that is one of the hard core issues of this case as to whether or not the defendant was indeed O'Connor or as to whether there was an O'Connor in flesh and blood who was another person.*" (T. 887)

This was the second time that the Court stated that the witness had "identified" the defendant as being O'Connor (see also T. 857). Although the witness *said* that the defendant "looked like" or "might be" or "resembled" O'Connor, and that he could not make an identification

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* The Court of Appeals found this second walk through the Courtroom to have been a violation of the principles enunciated in *Wade v. United States*, 388 U. S. 218, but found it not to have been prejudicial since it had been preceded by a valid photographic identification (97-8).

under oath (T. 840; 848; 849; 858; 859; 862; 865; 871; 872; 883), the Court's choice of words reflected the practical impact of the witness' testimony upon the jurors.

The Court then had the defendant repeat the following statement: "Murray Corporation is in the business incentive business. And we have ordered the goods from the Brearley Company. In connection wtih our premium incentive program." (T. 889).

On re-cross examination, the witness revealed that, prior to taking the stand in this case, he had told the prosecutor he could not be positive about his identification (T. 899-900).

In order to establish identity the prosecutor argued as follows in his summation to the jury:

> "Mr. Levine, the witness, testified that he looked like O'Connor, and that testimony, contrary to Mr. Palmer's statement, is evidence. *It is evidence upon which you may enter your verdict in this case.*
>
> "Now, there has been a lot of suggestion that somehow this was a maneuvered identification, that someone suggested something to Mr. Levine. I think if you review the testimony you may find that Mr. Levine's identification was entirely fair. The photographs are in evidence.
>
> "I urge you, if you have any question in your mind as to this identification, to look at the photographs yourselves, decide whether they are a fair sampling of photographs, whether they were suggestive in any way, and then keep in mind the fact that Mr. Levine picked out the first two photographs, and finally, the photograph of the defendant, Allen Roth, as the man who looked like O'Connor. And that Mr. Levine came into this courtroom and he pointed out

this man and he said, 'I want to see a man who called himself O'Connor. I am from Brearley Company.' You had already heard testimony that the Brearley Company had shipped merchandise and was looking for payment. He went to investigate the situation and talked to a man named O'Connor in the 40's, and he said this man Allen Roth looks like O'Connor.

"Now, the identification wasn't positive, but together with the other proof in this, the government submits that there can be only one conclusion which is that Allen Roth was P. K. O'Connor * * *" (T. 1246-1247).

C. The Government's other proof, thought by the Court of Appeals to have rendered the conceded Wade violation harmless.

In its opinion, the Court of Appeals minimized the effect of Levine's testimony by reference to other evidence in the case:

"Moreover, aside from the Levine testimony, substantial evidence supported the Government's contention that Roth was "O'Connor." Among other things, employees of two mail and telephone service companies testified that Roth over a six-year period picked up all of "P. K. O'Connor's" mail and messages. At the time of his arrest, Roth possessed 15 letters addressed to "P. K. O'Connor." In addition, shop owners identified Roth as the person from whom they purchased, at reduced prices, merchandise which had been shipped to "P. K. O'Connor" by the victim corporations." (A. 8-9)

The Answering Service Representatives

The proof revealed that the lesser Murray Corporation had made use of a telephone and mail service from 1961 through 1966 (T. 26). Under Post Office regulations, it was required that all corporate clients file a form which listed the names of the corporate principals. In this case, the form listed the names of Allen Roth (the defendant) and P. K. O'Connor (T. 28, 48). The witness testified that the defendant had specifically instructed her that his organization was not to be confused with the Murray Corporation of America, and that she should so advise mistaken callers (T. 21). She could not recall whether or not the defendant sometimes came to pick up mail with another person (R. 46). Thus, this testimony was completely consistent with the defense argument that there were two distinct individuals and that the defendant was innocent of misrepresentation.

The Mail Seized From The Defendant

It was never claimed by the defense that the defendant was ignorant of the fact that the various companies were sending mail and merchandise to his corporation. That was not the issue at trial. The issue was whether he was aware that misrepresentations had been made for the purpose of inducing the various companies to send these items. All of the letters in question were sent simply to the Murray Corporation—not the Murray Corporation *of America* (R. 5-7). It is noteworthy, that during the period of the alleged scheme, a Dun & Bradstreet report concerning the lesser Murray Corporation and available to all of the companies, pointedly stated: "Do not confuse with the Murray Corporation of America at a different address" (T. 441-442). This was the usual practice where firms had similar names. It is also of note that the letters were seized from

the defendant while he was at the public warehouse to which goods for his company were always shipped. Defendant was well known at the warehouse, under his own name, and regularly went there, sometimes in the company of another person (T. 55-58). It was conceded by the prosecution that the defendant's dealings with the warehouse were proper (T. 55-57).

Persons To Whom The Defendant Sold Merchandise

Two witnesses, owners of retail stores, testified that the defendant had sold them merchandise at reduced prices. Each of them paid for the merchandise by check and received an invoice in return (T. 241-244, 812-819). The total value of these sales was less than $250.00. The discount was 10% (T. 815).

These sales hardly constituted the sufficiently "substantial evidence" (A. 8) to neutralize the prejudicial effect of the Levine testimony. The defendant was hardly the first person in commerce to sell something at a reduced price.

Reasons for Granting the Writ

This case raises certain timely and important issues concerning eyewitness identification in criminal cases. One of these issues, that of right to counsel at non-emergency photographic identification proceedings (here conducted after trial had commenced), places before this Court a conflict between the holdings of the Courts of Appeals of the Second and Third Circuits.

The only eyewitness, Levine, was caused by the prosecutor to engage in three identification procedures. He had met

with the perpetrator only once, under brief and casual circumstances, more than three years before the trial. All of the procedures took place after trial had commenced, without the knowledge of the defense, and the defense was never advised they had occurred. As a result, the defense was entrapped into unwittingly evoking from the witness, before the jury, on cross examination, the fact of the first two procedures. The third (successful) procedure was purposely revealed by the Government during re-direct examination.

The first and second attempts at identification took place during trial, but two days before the witness testified. The witness could not recall which of these took place first. One involved a direction by the prosecutor that the witness walk through the courtroom to see if he could identify the defendant. The other involved a display of photographs in an anteroom adjoining the courtroom. The sequence of these two events was of critical importance, since the walk through did *not* result in an identification; on the other hand, the photographic display resulted in the witness selecting the picture of the defendant. Thus, if the walk through the courtroom took place first, and the witness saw the defendant in the courtroom, the immediately subsequent selection of the defendant's picture, from the display of photographs, must clearly be deemed the suggested product of the unsuccessful walk through the courtroom.

The third attempt took place on the same day as, but shortly before, the witness testified. He was again asked to walk through the courtroom, in which there were only four persons, and this time he successfully identified the defendant.

By a process of reasoning which effectively interpreted the facts in a light most favorable to the prosecution, the

Court of Appeals, utilizing two successive inferences, not supported by the record, concluded that the two walks through the courtroom, although violative of this Court's holding in *United States* v. *Wade*, 388 U.S. 218 (1967), had not prejudiced the defendant.

The first inference was that, since the witness had failed to recognize the defendant as being the perpetrator, the defendant must not have been in the courtroom at the time (A.5).* This flies in the face of logic. If the defendant were not in the courtroom, why would the prosecutor have conducted the procedure? Since the jury was filing into the courtroom at the time, where else would the defendant be? The more likely explanation is that the witness could not identify the defendant, and, for that reason, did not realize he was present.

Having unrealistically concluded that the defendant was not present during the first walk through the courtroom, the Court of Appeals avoided the necessity of dealing with the problem presented by the reasonable possibility that the witness subsequently selected the defendant's picture from the photographic display *because* he had just seen the defendant in the courtroom. By thus removing what would otherwise be an obvious taint, and by additionally holding that the defendant did not have a right to be represented by counsel at the photographic identification procedure, although counsel was readily available, the Court of Appeals found that procedure to be unobjectionable (A.6).

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* In at footnote (A.5-6), the Court sets forth an excerpt from the witness' testimony which reveals only that the defendant was not sitting in a particular chair and that the witness did not *recognise* the defendant as being in the room.

The Court of Appeals, while holding that the second walk through the courtroom violated the directives of *United States v. Wade*, 388 U.S. 218 (1967), held that since a successful and legitimate photographic identification had preceded it, the defendant had not been prejudiced (A.7-8).

The Court did not deal with the failure of the prosecution to warn the defense that the various secret procedures had been used, resulting in the unwitting exposure of the prior identifications to the jury.

I

Application of the exclusionary rules in identification cases should not be made to hinge upon whether the witness makes a positive identification or simply testifies that the defendant "looks like" the perpetrator.

In its attempt to shore up its conclusion that there was no prejudice as the result of the procedures used by the prosecution, the Court of Appeals noted that the witness:

> "at no time made a positive identification. His testimony did not vary from his initial 'look-alike' identification when he was shown the nine photographs two days before. The walk through in no way served to shore up his relatively weak identification from the witness stand." (A-8).

Although this Court has not previously had occasion to pass upon the question of whether a "weak" identification is governed by the rules enunciated in *Wade, supra*, there can be little doubt that the distinction is one without a difference. If anything, the weakness of the identification is all the more reason for applying the exclusionary rules to a questionable identification procedure.

II

Where an identification procedure has occurred which is subject to the criteria enunciated in *United States* v. *Wade*, 388 U.S. 218, and *Simmons* v. *United States*, 390 U.S. 277, it is incumbent upon the prosecution to so advise the defense in order to give the defense an opportunity to demand an exclusionary hearing, before the identification is revealed to the jury, and in order to safeguard against the unwitting revelation of prior identifications to the jury. This is particularly so where the procedures were conducted after the trial has commenced.

This Court has not specifically passed upon the question of whether the prosecution is obliged to reveal the fact of prior identification procedures to the defense, absent a demand for such information. We respectfully submit that the requirement of such revelation is implicit in the holdings of *Wade* and *Simmons, supra.*

Although this issue was raised in the briefs and argument in the Court of Appeals, the opinion is silent on that point.

Where, as here, the procedures have been secretly conducted after trial has commenced, it is unrealistic and unfair to place the burden upon defense counsel to demand an up-dating of the identification methods used by the prosecution.

The lack of such information effectively deprived the defense of the opportunity to have an evidentiary hearing outside of the presence of the jury, and led the defense down the garden path of unwittingly evoking the information from the witness during cross-examination. On redirect examination, the prosecution compounded the error

by intentionally having the witness testify concerning the theretofore undisclosed third (successful) identification.

Can it be doubted, aside from other considerations, that the revelation of the prior identification "shored up" the witness' otherwise tentative in-court identification?

We respectfully call upon this Court to pass upon this issue and to make unequivocally clear that such hide-and-seek tactics in an area of vital constitutional importance will not be permitted.

III

Since defense counsel was readily available in an adjoining room, and the case was in the midst of trial, it was a violation of Fifth Amendment due process and the Sixth Amendment right to counsel when the prosecutor failed to invite defense counsel to witness the photographic identification.

As noted by the Court of Appeals for the Third Circuit, this Court's opinion in *Simmons* v. *United States*, 390 U.S. 377 (1968):

> "did not deal with the issue of right to counsel at photographic identifications. The photographic identification in that case [Simmons] occurred prior to arrest and was part of the investigation process. However, when as in the present case, the investigation has resulted in the arrest of an accused, the right to counsel attaches. Moreover, while photographs are an important tool in investigating unsolved crimes and apprehending suspects, *Simmons* v. *United States, supra*, their use after the accused has been taken into custody is in most cases unnecessary. The requirement of counsel at photographic identifi-

> cations conducted after the accused is in custody and available for a more reliable corporeal identification will not hinder the police in the legitimate enforcement of the law." *United States* v. *Zeiler*, 427 F.2d 1305, 1307-footnote 3 (3rd Cir., 1970).

The Court, in *Zeiler, supra*, went on to hold "that the rule of the *Wade* case applies to pre-trial photographic identifications of an accused who is in custody" (427 F.2d 1305, 1307).

In its opinion in the present case, the Court of Appeals recognized that a survival of the conviction required that the photographic identification be declared unobjectionable, and held that "the photographic identification, in the absence of appellant's counsel, was not constitutionally proscribed" (A.6). In so holding, the Court specifically acknowledged that its decision was in conflict with the Third Circuit's decision in *Zeiler, supra* (A.6.).

We respectfully submit that, in light of the above conflict, this case presents an ideal vehicle for a consideration of this issue, particularly since counsel was in the next room, at the time of the photographic display and trial had commenced.

The very language used by the Court of Appeals in holding the second walk through the courtroom to be in violation of *Wade*, applies with equal force to the photographic identification:

> "Finally, unlike the situation in *Wade*, the Government cannot claim that it would be burdensome to contact the defendant's attorney or to require its own witness to be present at his convenience rather than their own. See 388 U.S. at 255-256 (White, *J.*, dissenting). Nor can the Government assert any need

> for quick identification at this stage of the case.[*] With time not a factor, there are no 'substantial countervailing policy considerations . . . against the requirement of the presence of counsel.' *United States* v. *Wade, supra*, at 237. Accordingly, we hold that the principles established in *Wade* apply *a fortiori* to identification confrontations such as in the instant case." (A.8)

We respectfully submit that the Court of Appeals' failure to apply the same rationale to the photographic identification resulted from a misinterpretation of the basis upon which the *Wade* and *Simmons* decisions were formulated.

Essentially, the identification cases are an attempt to prevent the prosecution from purposely or negligently manufacturing evidence under circumstances that do not permit effective exposure by the defense. Thus, those cases turn upon fundamental elements of due process as applied to the creation of evidence by the prosecution. They are not concerned with any right that a defendant has in the mere exhibition of his person or likeness; their concern is with the integrity of evidence presented to the jury and the preservation of information upon which that evidence may be tested by cross-examination. It is not the Fifth Amendment self-incrimination provision that is violated by an unfair identification procedure (*United States* v. *Wade*, 388 U.S. 218, 221-224), but the Fifth Amendment right to due process (*Simmons* v. *United States*, 390 U.S. 377, 382-386), and the Sixth Amendment right to have counsel present, where reasonable and practicable, to insure that due process is accorded to his client (*Wade, supra*, at 236-239).

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* The defendant was arrested on these charges on January 21, 1966 (T. 1049). He was not indicted until January 1, 1968 (R. 1), and the trial did not commence until February 3, 1969 (R. 1).

In this light, and particularly in view of the fact that counsel was in the next room and trial had commenced, any distinction between a line-up and a photographic identification, would be artificial.

If, in the present case, defense counsel had been advised that a photographic identification was about to occur, we would not be left with a record which, due to the forgetfullness of the witness, does not reveal whether the photographic identification preceded or followed the first walk through the courtroom; there would not have been a needless revelation of the prior identifications to the jury, and any doubt as to whether there had been a suggestive aspect to the identification would have been eliminated. *See*: *Zeiler, supra*, 427 F.2d, at 1307.

IV

The combined circumstances of the various identification procedures clearly raise a reasonable doubt as to whether they deprived the defendant of a fair trial.

Regardless of whether there existed a right to counsel during the photographic identification procedure, we respectfully submit that the Court of Appeals erred in holding that the combination of procedures did not create a reasonable doubt as to whether the defendant's right to a fair trial had been violated. [*Chapman* v. *California*, 386 U.S. 18, 23 (1967)]. It is clear that the Court of Appeals liberally construed the facts in favor of the prosecution. It is precisely this type of strained reasoning that this Court's opinion in *Wade, supra*, wished to eliminate.

CONCLUSION

For all of the above reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Petitioner,
Allen Roth

October, 1970

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 692—September Term, 1969.

(Argued April 8, 1970 Decided July 31, 1970.)

Docket No. 34474

UNITED STATES OF AMERICA,

Appellee,

—against—

ALLEN ROTH,

Appellant.

Before:

WATERMAN and FRIENDLY, *Circuit Judges*
and ZAMPANO, *District Judge.**

Appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, Edmund L. Palmieri, *Judge*, after a jury trial, for use of the mails in furtherance of a scheme to defraud in violation of 18 U.S.C. §§1341, 1342, and 2. Affirmed.

WHITNEY NORTH SEYMOUR, JR., Untied States Attorney for the Southern District of New York; JOHN W. NIELDS, JR. and JACK N. KAPLAN, Assistant United States Attorneys, of Counsel, *for Appellee.*

* Of the District of Connecticut, sitting by designation.

HENRY J. BOTTEL, 233 Broadway, New York, N. Y., *for Appellant.*

ZAMPANO, *District Judge:*

Appellant Allen Roth was convicted after a jury trial in the United States District Court for the Southern District of New York, Edmund L. Palmieri, *J.*, on 15 counts of mail fraud in violation of 18 U.S.C. §§1314, 1342, and 2. His appeal challenges two rulings at trial: 1) the denial of a motion to conduct a suppression hearing outside the presence of the jury, and 2) the admission of identification testimony after three allegedly impermissible out-of-court identification procedures. We find no error and affirm the judgment of the District Court.

The Government introduced substantial evidence that Roth used the mails as part of a scheme to defraud. The essence of the scheme was that Roth, with criminal intent, utilized the name "Murray Corporation" to induce numerous manufacturers and suppliers to send him large quantities of merchandise in the belief they were doing business with the Murray Corporation of America, a highly rated concern located in New York City. Roth falsely represented that his corporation had a Dun & Bradstreet credit rating of AAA-1, and that it was a division of the Murray Corporation of America. The goods from the victim corporations were shipped pursuant to orders received either by telephone or mail from a "P. K. O'Connor" who claimed to be an officer of the Murray Corporation of New York. The Government's evidence tended to prove that Roth on these occasions employed the

pseudonym "P. K. O'Connor" in order to hide his true identity.

The Government was able to produce at trial only one witness who had ever met "P. K. O'Connor." The witness, Donald Levine, testified that Roth "looked like" O'Connor, but acknowledged that he was unable to make a positive identification. There was no objection to this testimony.

Upon receipt of a complaint from the officials of the Murray Corporation of America, postal agent Carroll conducted an investigation into the activities of Roth, "O'Connor," and the Murray Corporation. Satisfied that the mails were being used to execute the fraudulent scheme, Inspector Carroll arrested Roth as he stood next to his automobile on a public street. A search of the trunk of Roth's car uncovered various incriminating items and letters which were admitted into evidence, over objection.

Appellant first contends he was entitled to a plenary hearing at trial on his motion to suppress the seized articles. The claim is without merit. Seven months prior to the trial, Judge Bonsal denied a similar motion to suppress the evidence because the appellant failed to appear at the hearing. No reason or excuse has been offered for his non-appearance. Not until the second day of trial did the defendant again request a suppression hearing. Judge Palmieri denied the request but stated that "at the conclusion of the Government's case I will review all the evidence with a view to determining whether there is any reason for me to suppress any of" it; he also invited defense counsel to renew the suppression motion after the defense case had been presented, in which event the motion would be decided "on the basis of the trial record." Under

these circumstances, Judge Palmieri would have been justified in refusing to entertain the suppression claim altogether. Rule 41(e), Fed. R. Crim. P.; *United States* v. *Di Donato*, 301 F.2d 383, 384 (2 Cir.), cert. denied, 370 U.S. 917 (1962); *United States* v. *Sansone*, 231 F.2d 887, 891-892 (2 Cir.), cert. denied, 351 U.S. 987 (1956). To the extent that he expressed willingness to suppress if the trial evidence called for it, he was giving the defendant more than was required. In any event, we have examined the record and find there was ample evidence to establish probable cause for the arrest; a hearing would have been fruitless.

Relying on *Chimel* v. *California*, 395 U.S. 752 (1969), the appellant argues that, even assuming the existence of probable cause for the arrest, Inspector Carroll was required first to obtain a warrant before he conducted a search of the vehicle. However, since the search and seizure occurred in 1966, we need not consider whether the principles established in *Chimel* apply. See *United States* v. *Bennett*, 415 F.2d 1113 (2 Cir. 1969). Pre-*Chimel* law clearly authorized the search of Roth's automobile at the time and place of the arrest. *United States* v. *Rabinowitz*, 339 U.S. 56 (1950); *United States* v. *Chaplin*, —— F.2d ——, Slip Op. 3049 (2 Cir. June 1, 1970); *United States* v. *Mazzochi*, —— F.2d ——, Slip Op. 2181 (2 Cir. April 7, 1970).

The appellant next asserts that Levine's in-court identification was impermissibly tainted by three prior identification procedures. Since this claim is raised for the first time on appeal, we do not have the benefit of trial court

findings on the issue.[1] However, the extensive cross-examination of Levine concerning his identification of Roth provides us with a record sufficiently adequate to enable us to conclude that the admission of the identification testimony neither deprived the appellant of due cross nor violated his right to counsel.

In 1966 Levine was the Eastern Sales Manager for the Brearley Company of Rockford, Illinois. He testified that in the course of his duties he met with a "Mr. O'Connor" of the Murray Corporation to discuss the sale of premium incentive gifts. Although Levine pointed out Roth in the courtroom as the person who "resembled" O'Connor, he stated he could not make a positive identification. Cross-examination disclosed that prior to being called as a witness, Levine had on two occasions walked into the courtroom "to see if Mr. O'Connor was there," and also had been shown a series of photographs from which he selected one (Roth's) as "looking most like O'Connor."

The first "walk through" occurred several days before Levine was called to testify, at a time when the court was in a recess. Levine entered the courtroom, observed about 12 spectators, but did not see Roth. We fail to perceive any merit to the claim that this act constituted a violation of the *Wade* requirements, 388 U.S. 218 (1967). The record clearly indicates that Roth was not in the courtroom at the time and that no identification was made.[2]

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[1] We have recently suggested that objections to identification testimony be heard and disposed of at a pretrial hearing. *United States ex rel. Phipps* v. *Follette,* F.2d , Slip Op. 2993, 2994 n. 1 (2 Cir. May 27, 1970).

[2] The incident was developed on cross-examination of Levine as follows:

"Q. Was Mr. Roth sitting there at the time when you walked in? Was he? Was he? I am asking you. A. No, he was not.

(Continued on ntxt page)

On the same day the prosecutor exhibited nine photographs to Levine for the purpose of determining whether he recognized "O'Connor's" picture among them. Defense counsel introduced the photographs into evidence and extensively cross-examined Levine on his selection. Thus the jury was fully informed of the nature of the photographic identification to assist it in weighing Levine's credibility. The record reveals no basis for a claim that the identification procedure was impermissibly suggestive. Cf. *Simmons* v. *United States*, 390 U.S. 377, 384 (1968); *United States* v. *Baker*, 419 F.2d 83, 89-90 (2 Cir. 1969), cert. denied, 397 U.S. 976 (1970). Under these circumstances, the photographic identification, in the absence of appellant's counsel, was not constitutionally proscribed. *United States* v. *Bennett*, 409 F.2d 888, 898-900 (2 Cir. 1969); accord, *United States* v. *Ballard*, 423 F.2d 127 (5 Cir. 1970); contra, *United States* v. *Zeiler*, 38 U.S.L.W. 2663 (3 Cir. June 5, 1970).

"Q. He was not. Where was he at 2:20? A. I don't know.

"Q. Where was he? A. I have no idea.

"Q.. Well, he wasn't sitting there. . You say there were about eight or ten spectators in the room. Were they behind this rail, the rail in which we are enclosed? Were these spectators behind this rail? A. That's where they would have been, yes.

"Q.. Who are they? A. The people you are just talking about.

"Q. Well, when you walked in, as you put it, there was no Mr. Doyle sitting here, there was no Mr. Carroll you think sitting there, no stenographer there, no Clerk here and no Judge up there, and no Mr. Roth over here. Right? A. Right, sir.

"Q. Was Mr. Roth sitting with the spectators? A. I could not find him at that time. In other words, I could not find anybody in the room at that particular time that I could identify.

"Q. Where did you find him, in the hall? Where did you find him? A. I didn't find him" (Tr. pp. 880-881).

Shortly before he was called to testify, Levine was asked by the prosecutor to leave the witness room during a recess "to see if O'Connor was in the courtroom." Levine entered the courtroom and observed among the four people there a person (presumably the appellant) who "resembled O'Connor." Thereupon Levine returned to the witness room and informed the prosecutor that he had seen someone who "looked like O'Connor," but that he could not be sure of his identification. The prosecutor did not press him for a positive identification and, as previously indicated, Levine's testimony on the issue at trial was equivocal. Appellant contends that *Wade* entitled him to advance notice of the walk through and to the assistance of counsel during the proceeding. We agree.

Although *Wade* was directly concerned only with a formal post-indictment lineup, we find its principles equally applicable to an informal post-indictment confrontation arranged by the Government. Cf. *Mason* v. *United States*, 414 F.2d 1176 (D.C. Cir. 1969). Indeed, the more informal the viewing procedure the greater the possibility of subtle suggestiveness. *Long* v. *United States*, 424 F.2d 799, 802 (D.C. Cir. 1969). In a formal lineup, the police may scrupulously seek to avoid suggestive elements. However, when a walk through occurs the prevailing conditions are beyond the control of the Government, and more likely than not, the defendant will be sitting at the counsel table, the very place the witness would look to find him. In addition, the defendant knows when a lineup takes place and gains some impression of the surrounding circumstances. In most cases the identification process may be re-established easily

and exactly at trial. With a walk through, there is no reason for the attorney or his client to focus on their surroundings and try to remember them; they are unaware of what is occurring. Reconstruction at trial therefore may be difficult or even impossible.

Finally, unlike the situation in *Wade*, the Government cannot claim that it would be burdensome to contact the defendant's attorney or to require its own witness to be present at his convenience rather than their own. *See* 388 U.S. at 255-256 (White, *J.*, dissenting). Nor can the Government assert any need for quick identification at this stage of the case. With time not a factor, there are no "substantial countervailing policy considerations . . . against the requirement of the presence of counsel." *United States* v. *Wade, supra*, at 237. Accordingly, we hold that the principles established in *Wade* apply *a fortiori* to identification confrontations such as in the instant case.

While we believe the walk-through identification procedure did not conform to *Wade* requirements, we are convinced that it did not taint Levine's testimony nor infect the trial. Reversal, therefore, is not required. Levine at no time made a positive identification. His testimony did not vary from his initial "look-alike" identification when he was shown the nine photographs two days before. The walk through in no way served to shore up his relatively weak identification from the witness stand.

Moreover, aside from the Levine testimony, substantial evidence supported the Government's contention that Roth was "O'Connor." Among other things, employees of two mail and telephone service companies testified that Roth over a six-year period picked up all of "P. K. O'Connor's" mail and messages. At the time of his arrest, Roth pos-

sessed 15 letters addressed to "P. K. O'Connor." In addition, shop owners identified Roth as the person from whom they purchased, at reduced prices, merchandise which had been shipped to "P. K. O'Connor" by the victim corporations.

Finding no error, we affirm.

APPENDIX B

Judgment and Commitment of the United States District Court

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 68 Cr. 16

U.S. District Court

Filed Mar 28 1969

S.D. of N.Y.

UNITED STATES OF AMERICA

v.

ALLEN ROTH

On this 28th day of March, 1969, came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly devising and intending to devise a scheme and artifice to defraud and to obtain property by means of false and fraudulent pretenses, representations and promises by means of the Post Office Department, in using and assuming and requesting to be addressed by fictitious, false and assumed titles, names and addresses, and name other than his own proper name, and did take and receive from a post office letters

and other mail matter. (Title 18, United States Code, Sections 1341, 1342 and 2)

as charged in 15 counts

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) YEARS, on each of counts 1 through 5 inclusive, to run concurrently with each other.

The defendant is continued on his present bail until he posts bail pending appeal fixed in the same amount. This should be done with due diligence and not later than April 2, 1969.

IT IS ORDERED that the Clerk deliver a copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ EDMUND L. PALMIERI
United States District Court

/s/ JOHN LIVINGSTON
Clerk

APPENDIX C

Judgment of Affirmance of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of July, one thousand nine hundred and seventy.

Present:

HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
Circuit Judges

HON. ROBERT C. ZAMPANO,
District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALLEN ROTH,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix C—Judgment of Affirmance of United States Court of Appeals

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk.

APPENDIX D

Decision on Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 34474

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALLEN ROTH,

Appellant.

MOTION TO FILE PETITION FOR REHEARING; PETITION FOR REHEARING, AND, IN THE ALTERNATIVE, FOR STAY OF MANDATE.

Henry J. Boitel, New York City,
for Appellant.

Motion for leave to file petition for rehearing is granted. Rehearing is denied. Unless panel action is overruled by *in banc* court, the alternative relief prayed for, i.e., the motion to stay the court's mandate pursuant to and subject to the provisions of FRAP Rule 41 is granted for the

permitted period of 30 days after the *in banc* court shall have acted. Bail is continued while stay is effective.

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Sterry R. Waterman, U.S.C.J.

.....

Henry J. Friendly, U.S.C.J.

.....

Robert C. Zampano, U.S.D.J.

September 15, 1970

UNITER STATES COURT OF APPEALS

SECOND CIRCUIT

Filed September 24, 1970

A. DANIEL FUSARO, Clerk

APPENDIX E

Decision on Motion and Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ALLEN ROTH,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard *in banc* having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

September 24, 1970